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No. 80-1519
IN THE

Supreme Court of the United States

October Term, 1980

J. ROGER BARBER, etc., *et al.*,

Petitioners,

vs.

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Second Circuit.

RESPONDENTS' BRIEF IN OPPOSITION.

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On Petition for a Writ of Certiorari to The United States Court of Appeals for the Second Circuit.

RESPONDENTS' BRIEF IN OPPOSITION.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE NO SHOWING OF IMPERATIVE PUBLIC IMPORTANCE OR REQUIREMENT FOR IMMEDIATE SETTLEMENT BY THIS COURT HAS BEEN MADE.

Petitioners seek a Writ of Certiorari to review a district court decision, *International Society for Krishna Consciousness v. Barber*, No. 77 CV 328 (N.D.N.Y. Aug. 25, 1980), which is presently on appeal to the Court of Appeals for the Second Circuit. Notably absent from the petition is any discussion of the terms of Rule 18 of this Court, which states explicitly that certiorari before judgment may be granted *only* if the case is of such "imperative public im-

portance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court''. U.S. Sup. Ct. R. 18.

No showing of imperative public importance has even been attempted by the petitioners, much less made. Issues similar, but not identical, to those of the present case are now before this Court in a fully briefed case, *Heffron v. International Society for Krishna Consciousness*, No. 80-795 (U.S., cert. granted Jan. 19, 1981). While the constitutionality of a state fair's ''booth rule'' may well be doctrinally significant for the development of the law of the freedom of expression, it is not an issue of such imperative public importance that the court of appeals' exercise of first-instance review should be ousted. Petitioners have not claimed that momentous consequences to the public as whole will result if it is held that those engaged in core first amendment activities upon the grounds of state fairs may not be restricted to the physical confines of leased ''booths.''

Likewise, nothing requires immediate settlement of this case. Petitioners now have the full benefit of the judgment of the district court. Principal appellate briefs have already been filed and the Second Circuit is scheduled to hear argument during the week of May 4, 1981. There is absolutely no reason not to let normal appellate procedure run its course. The court of appeals is fully equipped properly to interpret the decision rendered by this Court in *Heffron* and apply it to the circumstances and contentions of the present case.[1] Certainly if either party is dissatisfied with the Second Circuit's treatment of *Heffron* or believes that it otherwise erred in deciding constitutional issues, review in this Court

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[1]In fact, the petition if granted would unavoidably delay consideration of *Heffron* since the suggestion of an expedited briefing schedule in this case, Petition for Certiorari at 9, is impracticable. Argument in *Heffron* has been scheduled for April 20, 1981.

may then be sought. There is, moreover, no reason to believe that the court of appeals cannot recognize any relevant time element in the litigation and act accordingly. *See Aaron v. Cooper*, 357 U.S. 556, 567 (1958).

What pass for reasons why certiorari in this case should be granted prove, upon review, to be illegitimate. The assertion that there is a practice of granting pre-judgment certiorari when the same question is pending in this Court, Petition for Certiorari at 8 n.20, relies upon cases decided before 1970 which may or may not be consistent with the present form of Rule 18.[2] The supposedly unique record in this case is a consideration that, if relevant, will be appropriately taken account of by the court of appeals. In any event, the legal arguments presented in the petition are essentially identical to those made by the state in *Heffron*, as petitioners themselves acknowledge. See Petition for Certiorari at 8. No suggestion has been made that the record in *Heffron* is an inadequate predicate, for decision of the questions there presented.

In sum, no reason why certiorari before judgment should be granted in this case exists or has even been suggested. Moreover, the Second Circuit is quite capable of resolving

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[2]As it now exists, Rule 18 is derived from Rule 20 of the Rules of 1970. Prior to 1970, the rule on certiorari before judgment, Rule 39 of the Rules of 1939, was considerably less restrictive. *See* 13 *Moore's Federal Practice* ¶ 818.01[3] (2d ed. rev. 1981).

this case in light of the ultimate resolution of *Heffron* and of determining whether any distinguishing factors are present. The petition for certiorari should therefore be denied.

DATED: 9 April 1981.

Respectfully submitted,

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